(1)

89-380

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

CARL P. CALDWELL,

Petitioner,

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Did the Southwestern Bell Telephone Company's pension plan provide for nonforfeitable benefits as required by the Age Discrimination in Employment Act in order to permit the involuntary retirement of Carl Caldwell at age 65 under the bona fide executive exception to mandatory retirement at age 70?

Was Caldwell improperly denied, by summary judgment, a jury trial on the issue of whether he was a bona fide executive, especially in light of: (1) the divergent inferences from the evidence before the District Court, (2) the District Court's sua sponte action, and (3) Bell's inability to meet its clear and convincing burden of proof standard?

Was Caldwell improperly denied the right to amend his Complaint in 1982 and again in 1986, after he discovered facts from Bell that supported: (1) an

alternate theory that Bell failed to meet another condition precedent to the use of the AEDA's bona fide executive exception, and (2) an alternative cause of action that Bell's implementation of the exception was in violation of the terms in Bell's pension plan and also a subterfuge to evade the purposes of the ADEA?

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FEDERAL REGISTER:

LEGISLATIVE HISTORY:

The petitioner Carl P. Caldwell ("Caldwell") prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit entered on April 24, 1989. The Order overruling Caldwell's request for rehearing with suggestion for rehearing en banc was entered on June 1, 1989.

OPINIONS BELOW

The unreported Order and Judgment of the Court of Appeals appears in Ap.1-48[1] to this Petition. The Order denying Caldwell's request for a rehearing en banc, appears at Ap.49.

The unreported Memorandum Opinions and Orders of the District Court filed July 17, 1987, May 22, 1986, and August 20,

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1 References herein to the District Court Opinions are "DC.Op.p.__" preceded by the date of the particular opinion. References to the Court of Appeals opinion are "CA.Op.p.___". References to the page or pages in the Appendix are "Ap.", followed by the page number. The appendix is separately bound.

1982, appear at Ap.56,72&84, respectively. The Judgment of the District Court filed September 30, 1987, and as amended on January 28, 1988, appear at Ap.51&54, respectively.

JURISDICTION

The Order of the Court of Appeals was dated and entered on April 24, 1989. The Order denying Caldwell's petition for rehearing with suggestion for rehearing en banc was dated and entered on June 1, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTION, STATUTES, RULES AND REGULATIONS INVOLVED

1. The U.S. Const. Amend. VII.

2. Portions of the Reorganization Plan No. 1 of 1978, §2, 92 Stat. 3781, 5 U.S.C., app. 1.

3. Portions of the Reorganization Plan No. 4 of 1978, §101(a)&(b), 92 Stat. 3790 & 3792, 5 U.S.C., app. 1.

4. The Internal Revenue Code of 1954

("Code"), and particularly portions of 26 U.S.C. §§411(a)(3)(B), 414(b) & 1563(a)(1).

5. The Age Discrimination in Employment Act of 1967 as amended ("ADEA"), and particularly portions of 29 U.S.C. §§621, 623(a)(1), 623(f)(2), 626(c)(2), 628, 631(a), & 631(c)(1).

6. The Employment Retirement Income Security Act of 1974 as amended ("ERISA"), and particularly portions of 29 U.S.C. §§1002(19), 1053(a)(3)(B), 1060(a)(2)&(c), 1102(b)(3) and 1104(a)(1)(D).

7. Portions of Federal Rules of Civil Procedure, Rules 15(a), 38(a)&(b) and 56(c).

8. Portions of 26 CFR §1.411(a)-4.

9. Portions of 29 CFR §§541.1, 860.120(c), 1625.12, 2530.203-3(a)&(c), and 2530.210(b).

10. Portions of proposed and final regulations, explanations, interpretations, and notification, in 43 FR 59098,

et seq., [Dec. 19, 1978], and in 44 FR 66791, et seq., [Nov. 21, 1979].

Except where otherwise indicated, these statutes, rules, regulations, interpretations and notifications are cited as they existed at the time Caldwell was involuntarily retired on November 30, 1979. Their pertinent texts appear at Ap.97-146.

STATEMENT OF THE CASE

Caldwell initiated this case in the United States District Court pursuant to the provisions of 29 U.S.C. §626(b)&(c) of the ADEA as amended in 1978 [29 U.S.C. §§621-634]. Jurisdiction of the District Court was conferred by 29 U.S.C. §626(b)&(c). Caldwell's Complaint alleged that the respondent, Southwestern Bell Telephone Company ("Bell"), had forced him to retire on November 30, 1979, at age 65, in violation of the age 70 protection of the statute, and therefore requested reinstatement or in the

alternative damages. Bell answered that Caldwell was lawfully retired under 29 U.S.C. §631(c)(1) because he was a bona fide executive. Caldwell maintained that he was not a bona fide executive and that even if the trier of fact (a jury, which he requested) should hold against him on that issue, the exception to the age 70 requirement as contained in 29 U.S.C. §631(c)(1) was not available to Bell. Among other reasons, Bell did not meet a condition precedent to the utilization of the exception which required that the pension benefits applicable to Caldwell had to be "nonforfeitable".

The District Court held that the "retirement" at age 65 was unlawful because it was accomplished solely under the bona fide executive exception to the ADEA and the exception could not be relied on because the pension benefits under Bell's plan did not meet the requirement that they be nonforfeitable.

[8/20/82, DC.Op.pp.3&4; Ap.90-92]. The facts supporting the correctness of this ruling are set forth in the Argument portion of this Petition.

On this issue, the Court of Appeals reversed. [CA.Op.p.25; Ap.46]. In doing so, it acknowledged that on November 30, 1979, (when Caldwell was "retired") Bell's pension benfits were not "nonforfeitable" as required by 29 U.S.C. §631(c)(1), and continued so until Bell amended its plan on February 1, 1982, in order to meet the DOL's final interpretation effective January 1, 1982. 29 CFR §2530.203-3(c)(1).

Nevertheless, the Court of Appeals held that Bell should be excused from its violation of the ADEA because the law concerning the interpretation of the term "nonforfeitable" was in a "state of flux" on November 30, 1979. In the Argument portion of this Petition it will be shown that there is no valid justification for

the "state of flux" ruling. The Court of Appeals further held that since a regulation contrary to the wording of the statutes could have been issued (but was not so issued), that Bell did not have to comply with the clear wording of the statutes.[2] Such a holding is in conflict with this Court's recent pronouncement in Public Employees Ret. Sys. of Ohio v. Betts, 109 S.Ct. 2854, 2863 (1989).

On August 20, 1982, the District Court denied Bell's motion for summary judgment on the issue as to whether Caldwell held a bona fide executive position, holding in effect, that such an issue was at least a question for the jury. Subse-

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2 This holding is at odds with a D.C. Circuit Opinion that acknowledged that a reviewing court's "cognitive powers" are 'constrained' by the actual words and objective meanings' of the relevant statutes and regulations and one can only rely on those actual words and not "some agency's hidden intentions and idiosyncratic interpretations." Shepard v. Merit System Protection Bd., 652 F.2d 1040, 1045 (D.C. Cir. 1981).

quently on May 22, 1986, the District Court addressed additional issues, including questions involving the amount of damages. At that time, and without the bona fide executive issue being raised again by either party, the District Court ruled, sua sponte, by summary judgment that Caldwell was a bona fide executive [and without any evidentiary hearing, or the submission of the question to a jury, as requested by Caldwell and as provided in 29 U.S.C. §626(c)(2)]. Caldwell submits the fact he was denied a jury trial on this issue is in conflict with the 7th Amendment to the U.S. Constitution, 29 U.S.C. §626(c)(2), Rules 56(c) & 38(a), F.R.Civ.P., and with numerous holdings of this Court, including Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Further facts and authority on this issue are contained in the Argument portion of this Petition.

Based on information obtained solely by post-Complaint discovery procedures, Caldwell twice moved to amend the Complaint by alleging additional facts which, when proved, would have likewise shown his forced retirement to be unlawful under the provisions of the ADEA. [Ap.158-161&163]. The District Court twice refused permission to amend and in so doing stated no reason or justification whatever. [8/20/82, DC.Op.pp.6; Ap.95. 5/22/86, DC.Op.p.7;Ap.82-83]. Caldwell submits that this constitutes an abuse of discretion and is contrary to the holding of this Court in Foman v. Davis, 371 U.S. 178 (1982). The Court of Appeals affirmed, without discussion, simply holding that it found no abuse of discretion. [CA.Op.p.26;Ap.47&48]. The facts and law concerning this issue are more fully discussed in the Argument portion of this Petition.

Based on its holdings concerning

"nonforfeitable" and "bona fide executive", the Court of Appeals found it unnecessary to address the various other issues raised by the parties.

ARGUMENT

I. PENSION BENEFITS NOT NONFORFEITABLE

A. Concept of Nonforfeitable

The concept of nonforfeitable is a simple one. A pension plan must provide that its benefits are nonforfeitable except for certain permitted forfeitures or suspensions.[3] See: 29 U.S.C. §1002(19); Riley v. Meba Pension Trust, 570 F.2d 406, 409 (CA2 1977).

It is permissible for a plan to provide for the suspension of a retiree's benefits for the period of time that the retiree is employed by his former employer, the employer who maintained

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3 A provision for an impermissable suspension of pension benefits makes the benefits "conditional" and therefore "forfeitable" under 29 U.S.C. §1002(19). See also: 26 CFR §1.411(a)-4(a).

the plan under which those benefits were being paid. When a plan provides that benefits will be suspended if a retiree obtains employment from other than his former employer, an impermissible forfeiture occurs. This is against public policy as it discourages a retiree from seeking gainful employment elsewhere. 29 U.S.C. §621; Macellaro v. Goldman, 643 F.2d 813, 815 (CA DC 1980). Such a forfeiture is prohibited by both ERISA and the Code and also prevents the use of the bona fide executive exemption under the ADEA [29 U.S.C. §631(c)(1)].

B. Concept Applied To Case At Bar

The District Court determined that Bell's pension plan benefits were not nonforfeitable at the time of Caldwell's retirement because the plan contained provisions for the forfeiture of pension benefits if Caldwell were employed by certain employers other than his former employer (the one that maintained the

plan under which his benefits were being paid). [8/20/82, DC.Op.p.4;Ap.91-92]. Since the pension benefits were not nonforfeitable, Bell could not then meet one of the conditions precedent to Caldwell's early retirement under the bona fide executive exception. 29 U.S.C. § 631(c)(1). The Court of Appeals, though agreeing with the District Court's analysis of the statutory requirements for Caldwell's early retirement, disagreed that the definition of forfeitability was settled law. [CA.Op.pp.14&25;Ap.25&45]. The Court of Appeals concluded that forfeitability was subject to an interpretation which was in conflict with the language of the statute, and then on that premise, reversed the District Court's holding that Caldwell's involuntary retirement under 29 U.S.C. §631(c)(1) was unlawful. It held that Bell should not be held responsible for violating the statutory

and regulatory directives.

The Court of Appeals' opinion hinges on a gross misapplication of the law. It noted that Congress empowered the Department of Labor ("DOL") to issue regulations, if necessary, to determine when it is permissible to forfeit pension benefits when the retiree is employed by the employer who maintains the plan. [CA.Op.p.15;Ap.26]. The Court of Appeals concluded that such a delegation by Congress meant that the then existing statutory standard for determining forfeitability was unenforceable until Labor issued such a regulation. [CA.Op.p.16;Ap.29]. That conclusion was based on the assumption that the DOL could issue a regulation that could override the existing statutory standard. [Id.]. What the Court of Appeals failed to recognize was the well settled rule of law that a regulatory body cannot validly promulgate any regulation in conflict

with a statutory provision. Public Employees Ret. Sys. of Ohio v. Betts, supra.,

Also, the Court of Appeals selectively applied the statutory requirements and final regulations of the ADEA, ERISA and Code in effect at the time of Caldwell's retirement. Furthermore, it held that Bell's refusal to follow the clear wording of the statutes was excusable. It rationalized such a holding on a series of "novel" theories. As an example, the Court of Appeals relied upon an IRS form letter purportedly approving an issue for which the IRS had no responsibility and for which the IRS had expressly disavowed responsibility. In fact, the letter did not even contain the critical language attributed to it by the Court of Appeals.

C. At Caldwell's Retirement The Pension Benefits Were Not Nonforfeitable.

Although the ADEA does not specif-

ically define nonforfeitable, it is certain that the pension plan referenced in the bona fide executive exception of the ADEA and the concept of "nonforfeitable" as used therein is, of commercial necessity, in pari materia with the term "nonforfeitable" as used in both ERISA and the Code.[4] In particular, 29 U.S.C. §1053(a)(3)(B) and 26 U.S.C. §411(a)(3)(B) are two identically worded statutes that are incorporated into the bona fide executive exception provision of the ADEA. [CA.Op.pp.21-22;Ap.38-39]. These sections permit a suspension (forfeiture) of benefits for the period of time the retiree is employed "by the employer who maintains the plan under which such benefits were being paid". Furthermore, the ERISA definitional

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4 This is implicit in the EEOC regulation existing at Caldwell's retirement, that specifically adopted the statutory standard set forth in both ERISA and the Code. 29 CFR §1625.12(k)(1).

section of "nonforfeitable" in 29 U.S.C. §1002(19), is applicable to 29 U.S.C. §1053(a)(3)(B).

Certainly, the wording of the statutes was clear and the law was settled at the time of Caldwell's involuntarily retirement.[5] At that time, the following statutes and regulations were in place:

(1) It was unlawful for an employer to retire an employee between 40 and 70 years of age because of age. 29 U.S.C. §§623(a)(1) & 631(a).

(2) However, an exception to the foregoing was permitted if, inter alia, a bona fide executive was retired when he was entitled to an immediate nonforfeitable annual retirement benefit from the pension plan of his employer. 29 U.S.C. §631(c)(1).

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5 This is contrary to the statement on p. 25 of the Court of Appeals Opinion [Ap.45], that the "law on forfeitability * * * was not settled" on Caldwell's retirement.

(3) The bona fide executive exception to the ADEA could not be applied to any employee subject to plan provisions which could cause the cessation of payments to a retiree, except in those instances described in 26 U.S.C. §411(a)(3)(B)(i). 29 CFR §1625.12(k)(1).

A plan could only provide for the cessation of payments if the retiree was rehired by his former employer, or as stated in the statutes, a forfeiture was permissible if the plan provided for the forfeiture of the retiree's pension benefits upon reemployment "by an employer who maintains the plan under which such benefits were being paid". 26 U.S.C. §411(a)(3)(B)(i) and 29 U.S.C. §1053(a)(3)(B)(i). Upon a review of these statutes, it is abundantly clear that Bell's plan allowed for an impermissible forfeiture; thereby, the pension benefits were not nonforfeitable.

The Bell plan provided for the

suspension of benefits when a retiree was employed by any of 37 companies with whom Bell had an interchange of benefits agreement. [CA.Op.pp.10-11;Ap.18-19]. Each of the companies who were parties to the agreement maintained their own pension plan separate and apart from each other. [CA.Op.p.10;Ap.18]. Even though most (but not all) of the companies who were a party to the agreement could meet the 80% ownership test for the controlled group of corporations of which Bell was a part, they could not meet the requirements of ERISA and the Code because they did not have a single plan maintained by all members of the controlled group. [CA.Op.p.11;Ap.19]. See: 26 U.S.C. §§411(a)(3)(B), 414(b) & 1563; 29 U.S.C. §§1053(a)(3)(B) & 1060(a)(2) &(c). Moreover, two of the companies did not meet the 80% controlled group test and one other company had no owner relationship. Bell knew its plan failed to

meet the nonforfeitable standard of the statutes either for a member of a controlled group of corporations, or as a single employer, when it retired Caldwell. However, Bell claims it did not have to be in compliance with either until the proposed regulation became final. On behalf of Bell, its parent American Telephone and Telegraph Company ("AT&T") wrote the DOL requesting that the proposed regulation be changed so that the provision of Bell's plan would not continue to be unlawful after the final regulations were issued. [CA.Op.pp.17-19;Ap.31-33]. In apparent recognition of the fact that this was not going to occur, AT&T, on October 1, 1980 (subsequent to Caldwell's retirement), merged the separate Bell System plans into a single plan for all those companies who were 80% or more owned by AT&T so as to meet the prerequisite "controlled group" test. This left but two companies

in the interchange agreement who still could not meet the "controlled group" test.[6] The merged AT&T plan continued to provide for an unlawful suspension of benefits for retirees employed by these two companies until Bell amended its pension plan when final DOL regulations were issued, effective January 1, 1982.

The DOL knew that Bell's request for an alternate rule that would give effect to the practices of the Bell System would not meet the statutory standard and refused to make the changes suggested by AT&T. [CA.Op.p.16;Ap.28-29]. The District Court knew that Bell could not meet the statutory standard at the time of Caldwell's retirement and so held. [8/20/82, DC.Op.p.6;Ap.95]. The Court of Appeals also knew the plan did not meet

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6 CA.Op.p.21;Ap.37. However, the third company was not merged into Bell. Rochester Company had no owner relationship with Bell companies and its interchange agreement was terminated 12/31/79.

the nonforfeitable standard. [CA.Op.p.14;Ap.24]. However, in numerous pages of rationalization, it determined that the law was subject to an interpretation in conflict with the clear wording of the statutes [CA.Op.p.21;Ap.38], because the DOL could have issued a regulation overriding the statutory provisions. [CA.Op.p.22;Ap.39-40]. The Court of Appeals held, in effect, that if the DOL had issued such a final regulation and if the regulation had said what Bell wanted it to say, that Bell could have been able to meet the regulatory requirements (but not the superseding statutory requirements) and, therefore, Bell should not be punished for its illegal retirement of Caldwell. [CA.Op.p.25;Ap.45-46]. This was the astonishing conclusion reached, even though the Court of Appeals recognized that such a final regulation could have no retroactive effect. [CA.Op.p.25;Ap.46].

D. **Regulations Cannot Supersede Statutes**

In its flawed analysis, the Court of Appeals failed to recognize that neither the DOL nor the EEOC could have validly issued any regulation that would have abrogated the clear wording of the statutes.

> "It is the role of an administrative agency to execute legislative policy; neither agencies nor courts are free to rewrite acts of Congress." E.E.O.C. v. City of Mt. Lebanon, Pa., 842 F.2d 1480, 1495 (CA3 1988).

Any change in the regulations that would have arguably permitted Bell to continue with the provisions in its then existing plan would have been in conflict with the clear statutory directive and hence would have been unenforceable. Public Employees Ret. Sys. of Ohio v. Betts, supra.; Southeastern Community College v. Davis, 442 U.S. 397, 411, 99 S.Ct. 2361, 2369, 60 L.Ed.2d 980 (1979).

The Court of Appeals based its decision on the fact that the DOL had

authority to issue regulations concerning the plain meaning of a 1974 statutory term, i.e., "employer who maintains the plan", for purposes of determining whether a plan contained an impermissible forfeiture of benefits provision. It noted that the DOL had not issued such a final regulation prior to Caldwell's November 30, 1979, retirement [CA.Op.p.17;Ap.30][7] and gives little credence to a then proposed regulation, which did no more than restate the statutory requirement. Therefore, so concluded the Court of Appeals, that absent any final regulation, Bell was free to advance its own interpretation and rely on the same [CA.Op.pp.21&24;Ap.38&43-44], even though (1) the wording of the stat-

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7 The Court of Appeals gives little consideration to the fact that the ADEA itself defines both employer and employee [29 U.S.C. §630(b)&(f)] and the fact that the EEOC, not the DOL, was authorized to issue regulations under ADEA at Caldwell's retirement. 29 U.S.C. §628.

utes was clear and unambiguous, and (2) the DOL adopted, in its final regulations, the only available definition, the same statutory definition as set forth in the proposed regulation. [CA.Op.pp.19&20;Ap.34-36].

Aside from the erroneous analysis that the DOL could have expanded the definition of permissible pension plan benefit forfeitures, so as to apply to the employment by someone other than the "employer who maintains the plan", the fact is that at Caldwell's retirement, not only had the EEOC adopted the statutory definition of nonforfeitable [29 CFR §1625.12(k)(1)], but so too had the DOL, the very same DOL that the Court of Appeals identified as the one authorized to issue a regulation in conflict with the statutes. On December 19, 1978, the DOL preceded the text of the proposed regulation with a "Notice" that warned all employers that:

> "[s]uspension of benefit payments by plans prior to adoption of the regulation will be governed by section 203(a)(3)(B) of the Act [29 U.S.C. §1053(a)(3)(B)] without reference to the regulation [i.e., this proposed regulation]". 43 FR 59098 at 59099, 12/19/78. [Bracketed comments supplied herein and throughout this Petition unless otherwise indicated].

Therefore, the existing regulations promulgated by both the EEOC and the DOL simply adopted the statutory definitions.[8] AT&T was clearly aware of

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8 In this regard it is noted that Bell should also have been required to comply with the proposed rule, because the standard in the proposed rule did not change any then existing standard. St. George's University School of Medicine v. Bell, 514 F.Supp. 205, 210 (D.C. D.C. 1981). Furthermore, the "directive" in the Notice that accompanied the proposed rule, in the nature of an "interim regulation" was likewise binding on Bell. Wright v. Roanoke Redevelopment & Hous., 479 U.S. 418, 107 S.Ct. 766, 774, 93 L.Ed.2d 781 (1987)(interim regulations are entitled to deference as a valid interpretation of a statute and are legally enforceable); where a regulation repeats verbatim or merely tracks a statute, explaining something the statute already requires, the notice-and-comment procedures of 5 U.S.C. §553 are unnecessary. Komjathy v. Nat'l Transp. Safety Bd., 832 F.2d 1294, 1296-1297 (D.C. Cir. 1987); Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987); United

(FOOTNOTE 8 CONT'D NEXT PAGE)

this and the fact that Bell's plan did not meet the statutory test when (prior to Caldwell's retirement) Bell wrote to the DOL and pleaded for it to expand the proposed regulations so as to make Bell's "illegal" plan "legal". AT&T was very candid in its plea, when it stated, as noted by the Court of Appeals:

> "A literal application of the proposed Department rule would not allow for the suspension of pension payments upon the reemployment of a retiree who is receiving a pension payment from one Bell System 'interchange' company and who is reemployed by another such company. This is because the proposed regulation appears to restrict the suspension to instances of reemployment by an employer who maintains the same plan as the

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(FOOTNOTE 8 CONTINUED): Technologies Corp. v. U.S.E.P.A., 821 F.2d 714, 718 (D.C. Cir. 1987)(where a regulation is a codification of now statutory requirements, notice-and-comment procedures are not required.) In addition, such a directive or interpretation by the agencies charged with the enforcement of the ADEA, is entitled to great weight and deference. Griggs v. Duke Power Co., 401 U.S. 424, 433-34, 91 S.Ct. 849, 854-55, 28 L.Ed.2d 159 (1971); Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed. 2d 616 (1965); Orzel v. City of Wauwatosa Fire Dept., 697 F.2d 743, 748 and 754 (CA7 1983).

> employer making the pension payments and who is also a member of the control group." [Emphasis supplied by AT&T; CA.Op.p.18;Ap.32-33].

AT&T was correct. A "literal application of the proposed" regulation, (which did nothing more than adopt the then existing statutory standard) resulted in the inescapable conclusion that Bell was violating then existing pension law provisions, i.e., the nonforfeitability of pension plan benefits provisions. This is so because Bell's plan provided for the suspension of benefits in instances of reemployment of a retiree by an employer who neither maintained the plan nor was a member of the controlled group of the Bell System. [Ap.179].

Of course, the DOL (and correctly so) refused to accede to AT&T's request, as such actions

> "might broaden the authority of plans to impose suspensions beyond that contemplated by Congress" [CA.Op.p.20;Ap.36],

and because the

> "interpretation of the phrase 'an employer who maintains the plan' in section 203(a)(3)(B)(i) [29 U.S.C. §1053(a)(3)(B)(i)] should be consistent with the meaning given to that phrase as used in other sections of Part [sic] of Title I of the Act". [CA.Op.p.16;Ap.28-29].

E. Improper Selective Application Of Statutes and Regulations

Disregarding the fact that there was a 1976 final regulation defining the "employer who maintains the plan", the Court of Appeals opinion states:

> "the basic premise upon which the district court's decision rests *** is that the definition of 'employee' of an 'employer who maintains the plan' was settled law in 1979, circumscribed by the apparently plain meaning of those words, further defined by the controlled group concept of §414. We disagree with that premise." [CA.Op.p.14;Ap.25].

In support of this argument the Court of Appeals quotes the DOL's comments in 43 FR 59098 (12/19/78), and references 29 CFR §2530.203-3 to the effect that 29 CFR §2530 "presents a body of interdependent provisions" and the meaning of the phrase

"employer who maintains the plan" should be consistent with its meaning in other sections of ERISA. The court further quotes with emphasis:

> "the Department believes that it is appropriate to include employers described in §2530.210(d) and (e) as employers maintaining the plan for purposes of suspension of benefits". [CA.Op.p.16;Ap.29].

The referenced regulation is 29 CFR §2530.210, issued December 28, 1976, entitled "Employer or employers maintaining the plan", and provides in paragraph (b):

> "Section 210 of the Act [29 U.S.C. §1060] and sections 413(c), 414(b) and 414(c) of the Code [26 U.S.C. §§413(c), 414(b) and 414(c)] provide rules applicable to sections 202, 203 and 204 of the Act [29 U.S.C. §§1052, 1053 and 1054] and sections 410, 411(a) and 411(b) of the Code, [26 U.S.C. §§410, 411(a) & 411(b)] for purposes of determining who is an 'employer or employers maintaining the plan' and, accordingly, what service is required to be taken into account in the case of a plan maintained by more that one employer. Paragraphs (c) through (e) of this section set forth the rules for determining service required to be taken into account in the case of a plan or plans

> maintained by controlled groups of corporations * * *." 29 CFR §2530.210(b). [Emphasis supplied herein and throughout this Petition unless otherwise indicated].

Since the definition of "employer maintaining the plan" for accrual of service for benefit purposes had been in effect since 1976, it is not clear how the above-referenced quotation substantiates the Court of Appeals opinion that such a definition was not settled law in 1979. Neither is it clear how any different definition (for the suspension of benefit purposes or otherwise) would be in accord with the DOL's opinion that the interpretation of the phrase should be consistent with the meaning given in other sections of ERISA. It is also unclear as to why Bell, on March 5, 1979, would have objected to the inclusion by reference of this definition of the "employer who maintains the plan" in the DOL's proposed regulation, if Bell was then in compliance with the earlier and

then existent 1976 DOL regulation. [See: CA.Op.pp.17-18;Ap.31].

The Court of Appeals disingenuously urges that, since AT&T as the Bell representative, requested the DOL to issue a regulation that would broaden the authority of pension plans to impose suspensions beyond that contemplated by Congress, then the law on forfeitability was "unclear" and "in a state of flux". [CA.Op.pp.17,19,22&24;Ap.30,34,40&43]. The Court of Appeals determined that Bell could unilaterally take advantage of the "confusion" that Bell generated so as to involuntarily retire Caldwell, irrespective of the then existing law. [CA.Op.p.17-18;Ap.31-33].

The ADEA final regulation in effect at the time of Caldwell's involuntary retirement provides at 29 CFR §1625.12(b):

> "Since this provision is an exemption from the non-discrimination requirements of the Act, the burden is on the one seeking to invoke the exemption to show that

every element has been clearly and unmistakably met. Moreover, as with other exemptions from the Act, this exemption must be narrowly construed."[9]

Caldwell does not agree with the Court of Appeals' conclusion that the law was "unclear" and "in a state of flux"; however, assuming arguendo the correctness of its conclusion, then the Court of Appeals has chosen to ignore the mandate of the ADEA regulation that every element must be clearly and unmistakenly met. Obviously, if it is "unclear" as to what are the elements that determine a bona fide executive, as urged by the Court of Appeals, then it would be impossible to show that the "unclear" elements had been "clearly met". If this were so, Bell should not have invoked the executive exception and retired Caldwell. The

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9 Numerous courts have held that the statutory exceptions to the ADEA are to be narrowly and strictly construed. See: Orzel v. City of Wauwatosa Fire Dept., 697 F.2d 743, 748 (CA7 1983), and cases cited therein.

Court of Appeals should have so ruled.

The Court of Appeals and District Court correctly noted that the bona fide executive exception in the ADEA [29 U.S.C. §631(c)] was inextricably united with 26 U.S.C. §411(a)(3)(B) and 29 U.S.C. §1053(a)(3)(B). [CA.Op.p.13;Ap.23]. Such a linkage was clearly established by the final EEOC regulation issued on November 21, 1979, nine days prior to Caldwell's involuntary retirement. 29 CFR §1625.12(k)(1).[10] The comments accompanying the final regulation noted: (1) it was based on requests from commentators "to reconcile the proposed interpretation with section 411(a)(3) of the Code (26 U.S.C. §411(a)(3))" [44 FR 66796]; (2) the Commission "has chosen to

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10 "The annual retirement benefit must be 'nonforfeitable.' Accordingly, the exemption may not be applied to any employee subject to plan provisions which could cause the cessation of payments to a retiree * * *. For example, where a plan contains a provision under which benefits
(FOOTNOTE CONT'D NEXT PAGE)

adopt these section 411(a)(3) exceptions to its interpretation" [44 FR 66796]; (3) the final regulation was prepared under the direction of the DOL with the assistance of the Office of the Solicitor and the concurrence of the Office of the General Counsel of the EEOC [44 FR 66797]; and (4) it was issued by the EEOC [Id.,] since that Commission had assumed responsibility and authority for enforcement of the ADEA as a result of §2 of the Reorganization Plan No. 1 of 1978. [92 Stat. 3781; 5 U.S.C., app.1; 44 FR 66791].

However, despite all of the foregoing, the Court of Appeals for some inexplicable reason simply stated in its opinion:

(FOOTNOTE CONT'D FROM PREVIOUS PAGE)
would be suspended if a retiree * * * obtains employment with a competitor of the former employer, the retirement benefit will be deemed to be forfeitable. However, retirement benefits will not be deemed forfeitable solely because the benefits are discontinued or suspended for reasons permitted under §411(a)(3) of the Internal Revenue Code." 29 CFR §1625.12(k)(1).

> "The extent of that linkage, and whether the EEOC intended to be potentially less restrictive in its interpretation of §631(c) of the ADEA than §411(a)(3) of the Code, is not clear from the specific language used by the Agency." [CA.Op.p.13;Ap.23-24].

The agency's language [29 CFR §1625.12(k)(1)] states "the exception may not be applied to any employee subject to plan provisions which could cause the cessation of payments", and the referenced statute [26 U.S.C. §411(a)(3)] provides that the pension benefits are forfeitable if the plan contains suspension provisions other than those permitted in 26 U.S.C. §411(a)(3). Despite the foregoing, the Court of Appeals dismisses these clear statutory and regulatory requirements as "technical" and immaterial and adopts Bell's argument that, since Caldwell has not actually forfeited his benefits by securing employment with one of the interchange companies, he has not established that

Bell's plan provisions were subject to an impermissible forfeiture. [CA.Op.p.9;Ap.16]. The District Court held contrary, stating:

> "By choosing the word 'forfeitable', Congress imposed a requirement of certainty in the pension benefits of executives subject to early retirement. It did not require those executives who were forced from their jobs before attaining the age of 70 to actually endure a forfeiture of their pension in an attempt to establish that their early retirement was a violation of the ADEA." [8/20/82, DC.Op.p.4;Ap.91].

F. Appellate Court Rationalization

The Court of Appeals adopted an inaccurate statement by Bell to the effect that Bell

> "applied for and received a favorable determination letter dated July 11, 1979 from the IRS to the effect that the plan, as amended, was in compliance with §401, et. seq., of the Code, including §411". [CA.Op. p.23;Ap.41].

In its eagerness to rationalize its decision, the Court of Appeals then stated that the IRS was charged with the "supervision" of 26 U.S.C.

§411(a)(3)(B). [CA.Op.p.23;Ap.42]. The IRS in 26 CFR §1.411(a)-4(b)(2), issued August 22, 1977, acknowledged the DOL's responsibility for this section of the Code. Under §§101(a) & (b) of the Reorganization Plan No. 4 of 1978, the Secretary of Labor retained exclusive authority to issue "regulations, rulings, [and] opinions" on 29 U.S.C. §1053(a)(3)(B) [ERISA] and on 26 U.S.C. §411(a)(3)(B) [Code]. 92 Stat. 3790 & 3792; 5 U.S.C., app. 1. Furthermore, the opinion letter [Ap. 187-188] references no statutory provisions whatever, much less "§401, et. seq." It solely provides that "we have made a favorable determination on your application"; however, the application was not part of the record. Therefore, the Court of Appeals' decision was based on what Bell alleged the letter approved, and not the application itself. In another weak attempt to justify Bell's noncompliance with the law, the Court of

Appeals boldly states that "the reciprocity of benefits program was inherently pro-employee" [CA.Op.p.24;Ap.44]. The Court of Appeals failed to recognize that the interchange agreements require that in order for an employee's service to be transferred between the companies that service must be continuous, i.e., without even a one day break in service. [Ap.191-192]. This was an unlikely event, except for a management arranged transfer. However, ERISA and Code provisions for crediting an employee's service after a break in service are considerably more liberal. 29 U.S.C. §1052(b) & 26 U.S.C. §410(a)(5).

II. BONA FIDE EXECUTIVE ISSUE IMPROPER FOR SUMMARY JUDGMENT DISPOSITION

The ADEA, in 29 U.S.C. §626(c)(2) provides:

> "a person shall be entitled to a trial by jury of any issue of fact * * *regardless of whether equitable relief is sought by any party in

such action."

In the Complaint [Ap.147], Caldwell demanded a jury trial pursuant to Rule 38(b), F.R.Civ.P. Caldwell was entitled to a jury trial on all contested factual issues. U.S. Const. Amend. VII; Lorillard v. Ponz, 434 U.S. 575, 585, 98 S.Ct. 866, 872, 55 L.Ed.2d 40 (1978). The "bona fide executive" issue was presented to the District Court by Bell's motion for summary judgment filed on March 11, 1982. [Ap.162]. The District Court originally denied the motion. [8/20/82, DC.Op.pp.1&6;Ap.85&95]. Unexpectedly, almost 4 years later on May 22, 1986, the District Court, with no intervening hearing, evidence, argument or briefs, reversed itself, sua sponte, and sustained Bell's March 11, 1982, motion. [5/22/86, DC.Op.pp.3&4;Ap.76-77].

The Court of Appeals affirmed the summary judgment, justifying its ruling in this ingenious manner:

> "One of Caldwell's primary contentions is that the question of whether an employee is an executive is inherently factual and not a proper subject for summary judgment. However, we note that none of the material facts regarding Caldwell's employment position are in dispute. Therefore, the only question at hand is what was intended by the phrase 'bona fide executive.' It is well established that questions of statutory construction and congressional intent present questions of law properly resolved by summary judgment." [CA.Op.pp.7&8;Ap.12-13].

The material facts regarding Caldwell's employment were in dispute. The Court of Appeals, on the basis of Caldwell's job position description, decided that Caldwell met the definition of "executive" in the DOL regulation set forth in 29 CFR §541.1.[11] [CA.Op.p.5;Ap.8-9]. Thereupon, the Court of Appeals concluded that Caldwell's job fell within the criteria set forth in the

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11 This regulation promulgated under the Fair Labor Standards Act was not the sole test of a bona fide executive. There were additional requirements imposed by the EEOC. 29 CFR §1625.12(d).

EEOC regulation [29 CFR §1625.12(d)(2)] and quoted that regulation [CA.Op.p.6;Ap.9-10], and the District Court opinion with which it concurred. [CA.Op.p.7;Ap.11]. However, a comparison of the District Court's description of Caldwell's job and the description in the EEOC regulation showed an absence of any commonality in the description or terminology. The Court of Appeals did not (nor did the District Court) identify with specificity the particular category in the regulation which they perceived was applicable to Caldwell's job on the basis of the descriptive terms in the opinion. In fact, a relationship between the requirements in the regulation and the so called "material facts" did not exist, <u>except</u> for <u>inferences</u> that both lower courts have applied to both <u>disputed</u> and undisputed "material facts".

While it may be true that many of the underlying or historical facts regarding

Caldwell's "employment position" were not in dispute, the ultimate fact as to whether Caldwell was a bona fide executive was a factual issue hotly disputed. When the inferences to be drawn from agreed facts are divergent, this is then a question for the jury to weigh. Macy v. Trans World Airlines, Inc., 381 F.Supp. 142, 145 (D.C. Md. 1974); Patton v. Conrad Area School District, 388 F.Supp. 410, 418 (D.C. Del. 1975); Carpenter International, Inc. v. Kaiser Jamaica Corp., 369 F.Supp. 1138, 1143 (D.C. Del. 1974). The burden of proof that Caldwell was a bona fide executive was on Bell, as the movant. Adkickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). Furthermore, 29 CFR §1625.12(b) even goes further and placed the burden on Bell, as the employer, to establish that Caldwell's alleged bona fide executive status was "clearly and unmistakably met".

Though it may be accurate, as stated by the Court of Appeals, that the phrase "bona fide executive" was subject to some sort of statutory construction by the trial judge, the APPLICATION of the FACTS [and INFERENCES to be drawn from those facts] to the trial judge's "statutory construction", is solely within the province of the jury.

There was admittedly never any document issued by Bell advising Caldwell that he was a bona fide executive under the ADEA until Bell advised Caldwell that he would be forcibly retired. [Ap.150-152]. This advise occurred on October 11, 1979, less than two months prior to Caldwell's retirement. Therefore, solely jury questions concerning Bell's virtually simultaneous labelling of plaintiff as an executive, would involve such issues as motive, intent, Bell management's state of mind and credibility. These are all jury functions

to be weighed and determined at trial, not on a motion for summary judgment.

Certainly the District Court weighed these inferences and improperly usurped the function of the jury. This Court, in announcing the standard to apply in determining when a case cannot be decided on summary judgment, has stated:

> "[A]ll that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." First National Bank of Arizona vs. Cities Service Co., 391 U.S. 253, 288-289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d. 569 (1968).

This Supreme Court has further stated:

> "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson vs. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

> "Credibility determinations, the weigning of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to

> be believed, and all justifiable inferences are to be drawn in his favor." Id., at 477 U.S. 255, 106 S.Ct. 2513.

Pursuant to the directives set forth in Anderson, supra., 477 U.S. 252-255, 106 S.Ct. 2512-2513, the trial court can exclude an issue from the jury process, if it determines that the evidence could only support Bell's position, i.e., the jury would not have to weigh any evidence, as the only inference available for the jury would be that Caldwell was a bona fide executive. In making such a determination, the District Court would have to determine, based on all evidence submitted both by Bell and Caldwell, that the only inference that could be made by the finder of fact was that Caldwell was a bona fide executive. Furthermore, because of 29 CFR §1625.12(b), in so finding, the finder of fact would have to determine that Bell proved such by "clear and convincing" evidence. Anderson,

supra., 477 U.S. 255, 106 S.Ct. 2514. Caldwell respectfully submits that Bell's evidence failed to even meet the "beyond a preponderance" of the evidence rule, much less the more stringent "clear and convincing" evidence standard. In other words, not only could a jury have determined from the facts before it that Caldwell indeed was not a bona fide executive, but it certainly could have determined that Bell had failed to meet its burden of proof that Caldwell was a bona fide executive, under the clear and convincing evidence criterion.

A portion of the evidence on the issue which Caldwell expected to present to a jury was presented to the District Court prior to its denial of Bell's motion for summary judgment. However, because the District Court, sua sponte, reversed its decision almost four years later, no opportunity was ever given to present additional and material evidence on the

issue. Of course, the evidence tendered to the District Court must be viewed most favorable to the party opposing the motion for summary judgment.

> "[o]n summary judgment the inferences to be drawn from the underlying facts contained in (the moving party's materials) must be viewed in the light most favorable to the party opposing the motion." [Citation omitted]. Adkickes v. S.H. Kress & Co., 398 U.S. 144, 158-159, 90 S.Ct. 1598, 1609, 26 L.Ed.2d 142 (1970).

If Caldwell had been permitted a jury trial, he would have established Bell's perception of him in the decision making process within the corporate structure in 1979. The evidence would have also reflected:

(1) Bell, with headquarters in St. Louis, Missouri, had 95,273 employees and Caldwell was not an officer or officer level employee. [Ap.182,190&196.C.A.p.8; Ap.14].

(2) Only one officer was located in Oklahoma and that officer (Mr. Parsons)

was the head of the Oklahoma regional operation, which consisted of about one-tenth of Bell's total operations. [Ap.183].

(3) Caldwell (one of 127 salary grade 5 level employees) held the title of general manager-comptroller, Oklahoma. He reported to Mr. Schoonmaker, Director-Comptroller's Operations in St. Louis, who in turn, reported to Mr. Bailey, Vice President-Finance and Comptroller. Mr. Bailey was one of fifteen persons who occupied positions bearing the title of Vice President, and he, in turn, reported to Mr. Barnes, President of Bell. [Ap.182-186&195-208].

(4) In discovery, it was determined that a Vice President of AT&T (the then parent of Bell) stated in a presentation in May 1978, just after the enactment of the "bona fide executive" exception to the ADEA, that:

"probably all current 5th level

> employees and perhaps later some 4th level individuals will qualify * * * Since the $27,000 figure is non-escalating, we will have in the future an increasing number of persons with a pension of that amount".

The presentation concluded with the statement that it was the intention of AT&T to

> "utilize the $27,000 executive exception fully. We may, however, at some point be challenged on our approach". [Ap.165,169-170].

From the immediately foregoing statements alone, the jury could properly conclude that it was the intention of Bell management to illegally retire <u>all</u> management employees at age 65 under the "bona fide executive" exception who had an annual pension of $27,000, <u>whether or not they were actually bona fide executives</u>. This policy was enunciated despite the fact that the House Conference Committee Report provided:

> "The conference agreement make clear that an employee will not be subject to mandatory retirement solely because he or she meets the retirement income test. The employee must also be a bona fide executive or high policymaking employee." H.

Conf. R. No. 95-950, 95th Cong., 2d Sess., p. 9, reprinted in 1978 U.S. Code Cong. & Ad. News 528, 530.

(5) In order to take full advantage of the $27,000 pension provision of the exception, Bell avoided specificity in defining the employee who was a bona fide executive. Bell's pension plan simply provided in Sec. 4.1 (g), the following:

> "Mandatory retirement age"- "Each employee shall be retired from active service, whether or not he is eligible for a pension, not later than the last day of the month in which his seventieth birthday occurs except as otherwise provided by applicable state law and except those employees referred to in section 12(c)(1) of the ADEA who shall be retired not later than the last day of the month in which the sixty-fifth birthday occurs * * *" [Ap.178].

(6) In discovery, it was determined that internal guidelines dated November 6, 1978, were used by members of the Benefit Committee who were responsible for determining whether the employee fell within the bona fide executive exception. The guidelines provided that "generally

all fifth level employees and above will be covered under the Executive Exemption". [Ap.189]. Furthermore, in answering interrogatories Bell stated that the determination "must be done on a case by case basis". [Ap.157].

(7) Employees were not aware of these internal guidelines as evidenced by the answer to discovery of Bell to furnish a copy of each and every document issued by Bell during the three year period prior to November 30, 1979, in which Bell advised all salary grade 5A employees that they were considered by Bell to be a bona fide executive or in a high policy making position or words of similar import. Bell responded: "There are no such documents". [Ap.148-151].

(8) In discovery, Bell admitted that only on October 11, 1979, and November 20, 1979, (seven days <u>after</u> the benefit committee had already retired Caldwell) did Bell ever give Caldwell any written

notification that he was considered to be a bona fide executive under the ADEA. [Ap.148-155].

Prior to the District Court's decision to reverse its previous order and sustain Bell's motion for summary judgment on the bona fide executive issue (May 22, 1986), Caldwell, as a stockholder in Bell, received a Notice of Bell's 1985 Annual Shareholders' Meeting and a Proxy Statement. The notice stated: "Under the management pension plan, retirement is mandatory at age 65 for officers and other executives." The notice further advised, in a footnote, that on January 22, 1985, the Board of Directors requested that Mr. Barnes continue as Chairman and Chief Executive Officer of Bell through the end of 1989. The footnote also advised that Mr. Barnes would reach the normal retirement age of 65 in 1986. [Ap.193-194].

From this it would appear that the

bona fide executive exception to the nondiscrimination requirements of the ADEA and which was incorporated into Bell's plan as a mandatory requirement applicable to all employees referred to in 29 U.S.C. §631(c)(1), is being applied as an "optional term of the plan". In such a case, it permits individual, discretionary acts of discrimination, which do not fall within the 29 U.S.C. §623(f)(2) exception, and therefore becomes a subterfuge to evade the purposes of the ADEA. Public Employees Ret. Sys. of Ohio v. Betts, supra., at p. 2867. While Bell's Board of Directors may have had the authority to authorize the deletion of the 29 U.S.C. §631(c)(1) exception from the plan, it did not have the authority to authorize the optional application of said bona fide executive exception in the plan.

29 CFR §860.120(c), entitled Costs and benefits under employee benefit plans,

issued May 25, 1978, provides:

> "Where a discriminatory policy is an express term of a benefit plan, employees presumably have some opportunity to know of the policy and to plan (or protest) accordingly. Moreover, the requirement that the discrimination actually be prescribed by a plan assures that the particular plan provision will be equally applied to all employees of the same age. Where a discriminatory provision is an optional term of the plan, it permits individual, discretionary acts of discrimination, which does not fall within the section 4(f)(2) [29 U.S.C. §623(f)(2)] exception."

We submit that the above facts constitute sufficient evidence from which a jury could properly infer and find that not only was Bell engaging in a subterfuge to evade the purposes of the ADEA, but also that Caldwell was not even considered by Bell to be one of its executives until it became necessary to do so in order to retire him at age 65, and, at that time, Caldwell was in fact neither such an executive of Bell, nor one of its "very few top level employees", as referenced in 29 CFR §1625.12(d)(2).

The foregoing recitation of facts also precludes Bell from establishing by clear and convincing evidence that Caldwell was a bona fide executive. CERTAINLY there was, at the very least, a question of fact as to whether Bell had so established such under the stringent clear and convincing evidence standard. Under those circumstances a determination of the issue by summary judgment was not proper. Anderson, supra.

III. **DENIAL OF LEAVE TO AMEND COMPLAINT**

Under the ADEA, effective January 1, 1979, it became unlawful for Caldwell to be retired at age 65. The only applicable exception was if Bell's pension plan provided for a bona fide executive exception pursuant to 29 U.S.C. §631(c)(1). Of course, Bell advised Caldwell that he was being retired under the terms of Bell's plan. [Ap.152&178]. Therefore, such an exception, of necessity, must have been incorporated into

the pension plan.

A pension plan must contain a procedure for its amendment. 29 U.S.C. §1102(b)(3). Bell's pension plan authorizes the "committee" (Benefit Committee) to make changes in the plan with the consent of Bell's president and subject to the approval of Bell's Board of Directors. [Ap.181]. The plan also provides that the only exception to the requirement of Board approval is in those instances when "in the opinion of the committee" the changes "are dictated by requirement of federal or state statutes * * * or authorized or made desirable by such statutes". Caldwell contends that the "opinion of the committee" is controlling and that opinion is set forth clearly and unquestionably in the minutes of the December 20, 1978, committee meeting as follows:

> "On recommendation of the Chairman, it was voted that the Chairman be authorized to send the President a

> letter, a copy of which is attached, recommending the changes in the Plan for Employees' Pension, Disability Benefits and Death Benefits, with the request that the President submit the changes to the Board of Directors for consideration." [Ap.173]

Caldwell has discovered evidence that substantiates that neither the president nor the chairman of the Benefit Committee ever submitted these changes to the Board for approval, even though the Benefit Committee specifically conditioned the amendment of the plan on the approval of Bell's Board of Directors. [Ap.175-177]. Bell never contested below Caldwell's assertion that the Benefit Committee failed to obtain the required Board approval. Therefore, by "sidestepping" Bell's Board of Directors, certain executives of Bell were able to obtain an amendment to Bell's Pension Plan in violation of the terms of the plan and even in violation of Bell's fiduciary duties owed to the plan's participants. This

was in violation of the directive set forth in 29 U.S.C. §1104(a)(1)(D). Caldwell and other similarly situated plan participants were deprived of a full review of this amendment by Bell's Board of Directors and such was a condition precedent for the implementation of the Plan amendment required to justify Caldwell's early retirement under 29 U.S.C. §631(c)(1).

Without there being a provision in Bell's plan for a bona fide executive exception to the ADEA's protection to age 70, 29 U.S.C. §631(c) has no applicability to Bell's retirement of Caldwell because, the pension plan itself must provide for the retirement of a bona fide executive at age 65 along with his right to a nonforfeitable annual benefit. The pension plan and 29 U.S.C. §623(f)(2) both recognize this requirement. Bell recognized this requirement, but was in such a rush to implement the proposed

plan modification prior to the January 1, 1979, effective date of the ADEA amendment, that it failed to obtain its Board of Directors' approval as required under the plan and as required by the plan's Benefit Committee.

Upon discovery, during this action, of the aforesaid facts, Caldwell sought to allege that the January 1, 1979, amendment to Bell's pension plan was not properly adopted, and therefore Bell could not utilize the bona fide executive exception to the ADEA. This issue was initially raised in Caldwell's Request to File Additional Amendments, said instrument being filed in the District Court on January 26, 1982. [Ap.158]. The District Court initially and incorrectly ruled that Caldwell's motion had been rendered moot. [8/20/82, DC.Op.p.6;Ap.95]. However, Caldwell renewed his request by Motion to File Additional Amendments, which was filed in

the District Court on May 3, 1984. [Ap.163]. This motion was likewise denied by the District Court in its memorandum opinion and order filed May 22, 1986. [5/22/86, DC.Op.p.7;Ap.82-83]. The Court of Appeals, without explanation, simply found no abuse of discretion. [CA.Op.p.26;Ap.47].

Rule 15(a), F.R.Civ.P. requires the trial court to allow a party to amend his pleadings when justice so requires. The District Court twice denied Caldwell's request to amend his Complaint, and both times the District Court denied the request but gave no reason or justification for refusing to allow the amendment. It is reversible error for a court to abuse its discretion and violate Rule 15(a), F.R. Civ.P. In that regard, the United States Supreme Court has held that an

> "outright refusal to grant the leave without any justifying reason appearing for the denial is not an

> exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules",

and therefore reversible error. Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d. 222 (1962).

In summation, and irrespective of Caldwell's status as a bona fide executive or the status of his pension plan benefits as nonforfeitable, unless Bell properly enacted an amendment to its pension plan prior to the retirement of Caldwell, Bell is unable to rely upon the bona fide executive exception for Caldwell's forced early retirement. By prohibiting Caldwell from amending his Complaint to include such pertinent allegations and thereby proving them at a trial, the District Court abused its discretion. The Court of Appeals' opinion in finding "no abuse of discretion by the district court", is also in conflict with Foman v. Davis, supra.

Bell's activities in this regard are especially pernicious when considered in conjunction with Bell's illegal policy of picking and choosing which alleged bona fide executives it will discriminate against and subject to its early retirement directives. This policy of Bell has been described heretofore and is evidenced in its "Notice of 1985 Annual Meeting and Proxy Statement". [Ap.193-194]. Under the recent Supreme Court case of Firestone Tire and Rubber Co. v. Bruch, 109 S.Ct. 948, 949 (1989), Bell's activities in this regard are not subject to an arbitrary and capricious standard. Bell, as plan fiduciary, in amending its pension plan, is required to comply with the plan's terms. [29 U.S.C. §1104(a)(1)(D)].

CONCLUSION

Caldwell respectfully submits that the United States Court of Appeals for the Tenth Circuit has decided each of the

federal questions set forth at the beginning of this Petition in a way in conflict with applicable decisions of this Court. In particular, the Tenth Circuit determined that Bell did not have to comply with the nonforfeitable pension benefit precondition for implementation of the bona fide executive exception permitting the early retirement of Caldwell under the ADEA. In doing so, the Court of Appeals failed to apply the clear wording of the pertinent statutes and regulations, in violation of this Court's decisions in Public Employees Ret. Sys. of Ohio vs. Betts, supra., and Southeastern Community College v. Davis, supra. Secondly, the Tenth Circuit failed to rule that Caldwell was entitled to a jury trial, in violation of this Court's decisions in Lorillard vs. Ponz, supra., Adkickes vs. S. H. Kress & Co., supra., First National Bank of Arizona vs. Cities Service Co., supra.,

and Anderson vs. Liberty Lobby, Inc., supra. Lastly, the Tenth Circuit failed to hold that it was an abuse of discretion for the District Court to refuse Caldwell permission to amend his Complaint after discovery of facts that resulted in nullifying Bell's attempted compliance with one of the preconditions to a valid early retirement of Caldwell, in conflict with this Court's decision in Foman vs. Davis, supra.

Because of the foregoing, Caldwell prays that this Court grant this instant petition for certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Joseph A. Claro, a member of the Bar of this Court hereby certifies that on the 30th day of August, 1989, three copies of the above and foregoing instrument were deposited in a United States mail box, with first-class postage prepaid, and addressed to counsel of record for respondent, at said counsel's post office address as follows:

Mona S. Lambird, Esq.
Andrews, Davis, Legg,
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Respondent is the only party required to be served herewith.

Joseph A. Claro